1990

State of Utah v. Richard Lee Crawford : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
		Case No. 900172-CA
Plaintiff/Appellee,	:	
v.	:	
RICHARD LEE CRAWFORD,	:	Category No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM THE DENIAL OF A MOTION FOR A NEW TRIAL. DEFENDANT WAS CONVICTED OF THEFT AND BURGLARY OF A DWELLING, BOTH SECOND DEGREE FELONIES, AFTER A JURY TRIAL IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, JUDGE, PRESIDING.

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STATE OF UTAH, Plaintiff/Appellee,	:	Case No. 900172-CA
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the denial of a motion for a new trial. Defendant was convicted of theft and burglary of a dwelling, both second degree felonies, after a trial in the Fourth Judicial District Court. This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

1. Did the lower court properly deny defendant's motion for a new trial based upon defendant's claim that the prosecutor withheld exculpatory evidence? The decision to grant or deny a motion for a new trial is a matter within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. State v. Williams, 712 P.2d 220, 223 (Utah 1985).

2. Did the lower court properly deny defendant's motion for a new trial based upon defendant's claim that the

prosecutor failed to call a particular witness? (The same standard as cited above is applicable.)

3. Did the lower court properly deny defendant's motion for new trial based upon defendant's claim that the prosecutor mentioned evidence in his opening statement that was not admitted into evidence during trial? (Same standard.)

4. Did the lower court properly deny defendant's motion for a new trial based upon defendant's claim that a state's witness was intoxicated at trial? (Same standard.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The relevant provisions relied upon by the State are set forth in the argument section of the brief.

STATEMENT OF THE CASE

Defendant was charged with burglary of a dwelling, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1978), and theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1978) (R. 3-4). He was convicted on both counts after a jury trial held December 7 and 8, 1988, in the Fourth Judicial District Court, the Honorable Ray M. Harding, Judge, presiding (R. 146-47, T. 1).[1] Judge Harding sentenced defendant on January 10, 1989, to serve two concurrent terms of one to fifteen years at the Utah State Prison (R. 155-59).

Defendant filed a motion for a new trial on January 4, 1989 (R. 151-53). Judge Harding denied defendant's motion on April 24, 1989 in a Memorandum Decision (R. 185-86) (See

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[1] The record on appeal has been designated "R.", the trial transcript has been designated "T.", and the preliminary hearing transcript has been designated "P.".

Appendices "A", Memorandum Decision; and "B", Order).

STATEMENT OF FACTS

On February 25, 1988, six rooms at the Paradise Inn in Fillmore, Utah, were burglarized (T. 58, 60, 66). The burglar stole a television set, remote control and a bedspread from each room (T. 67, 87). The bedspreads were rust in color, made of a unique design, and had been bought from a motel supply company that does not sell its wares to the general public (T. 65, 74, 80, 81). Sergeant John Kimball of the Millard County Sheriff's Office found evidence of forced entry on the motel room doors and subsequently recovered two stolen bedspreads, one from Steve Johnson and the other from Margarite Byrge (T. 125, 126, 129).

At trial, Deputy James Masner of the Millard County Sheriff's Office was qualified as a fingerprint expert and positively identified defendant's latent fingerprint found on a television mounting bracket in one of the burglarized motel rooms (T. 168-69, 166, 174-75). Richard Wright, a latent fingerprint examiner at the State of Utah Crime Lab, concurred with Masner's opinion (T. 237-41). Masner also testified that a footprint taken at the motel matched the tred from defendant's shoe (T. 181-82, 190-92).

During trial, defendant objected to the admission of several screwdrivers and a pry bar on the basis that they were illegally seized from defendant's vehicle (T. 221). The prosecutor had previously mentioned these items in his opening statement along with the fact that a large screwdriver or a pry bar had apparently been used to break into the motel rooms (T.

53-54). The record is unclear whether the lower court suppressed these items, or whether the prosecutor simply agreed not to offer them into evidence (T. 233-35). In either event, the items were not offered or further mentioned.

Testifying on his own behalf, defendant denied that he gave Byrge the bedspread (T. 254). He also claimed that he did not buy the shoes Masner matched with the footprints at the crime scene until the day after the motel burglary (T. 258). Finally, he denied that he had been to the Paradise Inn in Fillmore, Utah (T. 262-63).

SUMMARY OF ARGUMENT

The lower court did not abuse its discretion in refusing to grant defendant's motion for a new trial based on defendant's claim that the State withheld exculpatory information in the form of a witness. The trial court found that the testimony at the preliminary hearing fully apprised defendant of the witness's name and general testimony. Additionally, defendant was not prejudiced by the absence of the testimony since it did nothing to undermine the overwhelming evidence of defendant's guilt.

The lower court also did not abuse his discretion in denying a new trial on the basis that the State failed to call the alleged exculpatory witness. The State has no obligation to call witnesses on defendant's behalf. Had defendant desired this witness's testimony, he could have subpoenaed the witness himself.

The lower court did not abuse its discretion in denying

defendant's motion for new trial based on defendant's claim that the prosecutor improperly mentioned evidence in his opening statement which was not offered during trial. Defendant did not object to the opening statement at trial. Additionally, the prosecutor in good faith referred to evidence which was subsequently not offered due to defendant's belated suppression motion raised in the midst of trial. In any event, the prosecutor's comments did not prejudice the trial's outcome.

The lower court did not abuse its discretion in denying a new trial on defendant's claim that a State's witness was intoxicated at trial. Intoxication by itself does not make a witness incompetent to testify, but instead goes to the witness's credibility. Defendant had an opportunity to explore this witness's alleged intoxication, but chose not to do so. The trial judge found no evidence of intoxication and no prejudice in any event.

ARGUMENT

POINT I

DEFENDANT HAD ACTUAL KNOWLEDGE OF THE ALLEGED UNDISCLOSED EXCULPATORY EVIDENCE

Defendant argues that the State withheld exculpatory evidence consisting of Steven Johnson's statement that defendant had given him the bedspread over a year before the motel burglary. (See Brief of Appellant at 6-7). He concludes that the lower court abused its discretion in denying his motion for new trial based on this ground. Defendant's claim must fail.

Defendant had actual notice of Steven Johnson's statement. Judge Harding specifically found "that even though

Mr. Johnson was not present at the Preliminary Hearing, the Defendant received all the information which he was entitled to concerning the possible testimony of Mr. Johnson and the second bedspread." (R. 232-33) (See Appendix "B"; Order). The lower court's finding was based upon the preliminary hearing testimony of Deputy John Kimball who indicated that Johnson told him that he obtained the bedspread from defendant approximately January 1, 1987 (P. 16). Accordingly, the lower court found that defendant "had ample opportunity to call Mr. Johnson and examine him concerning the bedspread, had the Defendant wanted to issue a subpoena. (R. 232-33) (See Appendix "B"; Order).

Additionally, defendant's preliminary hearing included three separate informations charging defendant with burglary and theft of the Paradise Inn on three separate occasions; January 12, 1987, December 7, 1987 and February 25, 1988 (P.3, 73-75). Defendant was bound over on all charges, but was tried separately on the February 25, 1988 burglary (Id.). Thus, the testimony of Steve Johnson was not exculpatory for defendant, but was simply relevant to the previous burglary.

POINT II

DEFENDANT CANNOT COMPLAIN THAT THE STATE DID NOT CALL A WITNESS WHICH COULD HAVE BEEN CALLED BY THE DEFENSE.

Defendant next claims that the State should have called Steve Johnson as a witness so that defendant could have cross-examined him. Defendant's claim lacks merit.

While defendant cites numerous cases on the importance of cross-examination, he fails to cite a single case that

requires the prosecution to call witnesses on defendant's behalf. On the other hand, the Idaho Court of Appeals has specifically held that the prosecution's failure to call a witness does not implicate a defendant's confrontation rights. State v. Sena, 106 Idaho 25, 674 P.2d 454, 457 (Ct. App. 1983). Indeed, the weight of authority suggests that the prosecution has no duty to call witnesses for the defense. As the Mississippi Supreme Court bluntly stated, "Neither the appellant, nor the court, instructs the State, or any other party to litigation, what witnesses that party shall put on the stand or how that party shall present its case." Hickson v. State, 512 So.2d 1, 3 (Miss. 1987). See also Beverly v. State, 543 N.E.2d 1111, 1115 (Ind. 1989). But see State v. Larson, 453 N.W.2d 42, 47 (Minn.), vacated, 111 S. Ct. 29 (1990) (state should call child witness whose hearsay statements are being used as evidence against defendant).

In the instant case, the lower court found "that the State can call and use whatever witnesses it feels are necessary, and is under no obligation to call witnesses for the defense. Had the defendant wanted Mr. Johnson's testimony, he could have issued a subpoena." (R. 185-86) (See Appendix "A"; Memorandum Decision). Having knowledge of Johnson's potential testimony, defendant chose neither to subpoena Johnson nor call him as a witness. Defendant cannot now complain that the State failed to call him as a witness.

POINT III

THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL ON DEFENDANT'S CLAIM THAT THE PROSECUTOR REFERRED IN HIS OPENING STATEMENT TO EVIDENCE NOT INTRODUCED AT TRIAL

Defendant argues that the prosecutor made improper reference in his opening statement to burglar tools which were not introduced at trial. Once again, defendant's claim must fail.

The Utah Supreme Court has stated that the purpose of an opening statement is to apprise the jury of what counsel intends to prove by providing an overview of the facts counsel intends to prove. State v. Williams, 656 P.2d 450, 452 (Utah 1982); See also State v. Lafferty, 749 P.2d 1239, 1254 (Utah 1988), on reconsideration, 776 P.2d 631 (Utah 1989) (continued vitality of Williams). In reviewing an opening statement on appeal, the test is whether the statements, viewed against the entire argument, deprived defendant of a fair trial. United States v. Wilkinson, 754 F.2d 1427, 1435 (2d Cir.), cert. denied sub. nom., Shipp v. United States, 472 U.S. 1019 (1985). The Missouri Court of Appeals has held that "[w]hen the prosecutor has reasonable grounds to believe that the facts stated can be proved, the statement is not improper." State v. Drinkard, 750 S.W.2d 630, 636 (Mo. Ct. App. 1987). See Commonwealth v. Lamrini, 392 Mass. 427, 467 N.E.2d 95, 99 n.4 (1984); State v. Freeman, 539 So.2d 739, 744 (La. Ct. App.), writ denied, 543 So.2d 17 (La. 1989); State v. Maillian, 464 So.2d 1071, 1075 (La. Ct. App.), writ denied, 469 So. 2d 982 (La. 1985).

As part of his opening statement, the prosecutor

informed the jury that he intended to introduce several screwdrivers and a pry bar which the jury could compare with the marks on the doorjams of the motel rooms (T. 53-54). However, during trial, defendant objected to the tools, arguing they had been illegally seized (T. 221). Both the prosecutor and defense counsel discussed the propriety of the seizure with Judge Harding (T. 222-26, 232-36). The tools ultimately were not admitted, although it is unclear whether they were suppressed by the judge, or whether the prosecutor simply agreed not to offer them (T. 233-35).

The record is clear that the prosecutor acted in good faith. He fully expected to introduce the tools into evidence. He could not foresee defendant's objection since he considered the tools to be legally seized in plain view under a search warrant on defendant's vehicle (T. 233). Additionally, defendant had not sought a pretrial suppression ruling as required by Rule 12(b), Utah Rules of Criminal Procedure. Since the prosecutor's remarks were not prejudicial to the outcome and he did not act in bad faith, defendant's claim of error must fail. See United States v. Obregon, 893 F.2d 1307 (11th Cir.), cert. denied, 110 S. Ct. 1833 (1990); United States v. Tolman, 826 F.2d 971, 973 (10th Cir. 1987).

POINT IV

THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL ON DEFENDANT'S CLAIM THAT A STATE'S WITNESS WAS INTOXICATED AT TRIAL.

Defendant claims that Margarite Byrge testified while intoxicated and that her alleged intoxication denied him a fair trial. Once again, defendant's position lacks merit.

Rule 601 of the Utah Rules of Evidence states that "[e]very person is competent to be a witness except as otherwise provided in these rules." Id. The Utah Supreme Court has previously held that the fact that witness is a drug addict goes *not to competency, but to the witness's credibility.* State v. Eaton, 569 P.2d 1114, 1116-17 (Utah 1977) The West Virginia Supreme Court of Appeals recently held that an intoxicated witness will be excluded only if he does not know what he is testifying to. State v. Porter, 392 S.E.2d 216, 223 (W. Va. 1990). Otherwise, a witness's intoxication goes to credibility. Id. See United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.), cert. denied, 110 S. Ct. 127 (1989) (applying Rule 601, Federal Rules of Evidence). See also State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, 1121, cert. denied, 464 U.S. 865 (1983); Mirin v. State, 93 Nev. 57, 560 P.2d 145, 145 (1977); State v. Hall, 464 So.2d 966, 969 (La. Ct. App. 1985).

The crux of defendant's argument is that the jury should have been informed of Byrge's alleged intoxication. To support his claim that Byrge was intoxicated, defendant presented in support of his motion for new trial an affidavit from his investigator stating the investigator detected the odor of

alcohol on Byrge's breath immediately after she had testified (R. 177-78). However, defendant chose to release Byrge as a witness the next day, rather than call her to the stand (T. 236). If defendant wanted to question Byrge about her alleged intoxication, he had every opportunity to do so. His failure to timely raise the issue or request a cautionary jury instruction constitutes waiver. See State v. Hales, 652 P.2d 1290, 1292 (Utah 1982).

Additionally, Judge Harding stated in his Memorandum Decision:

> Defense alleges that Margarite Burge [sic] might have been impaired by drugs or alcohol and was therefor an unreliable witness. The Court is not aware of any evidence that Ms. Burge [sic] was impaired at the time she testified. The only evidence is that she had alcohol on her breath after the trial. During trial the Court did not detect any evidence that she was impaired in any way. The testimony presented at trial was more helpful to the defendant than damaging.

(R. 186) (See Appendix A). Judge Harding was in a position to observe Byrge's demeanor and the responsiveness of her answers. He clearly determined that Byrge was not impaired. See United States v. Bevens, 728 F. Supp. 340, 346-47 (E.D. Pa. 1990), aff'd, 914 F.2d 244 (3rd Cir. 1990). He also concluded that because Byrge's testimony was more favorable to defendant than damaging, defendant was not prejudiced by the failure to inquire into Byrge's sobriety at trial.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm defendant's convictions.

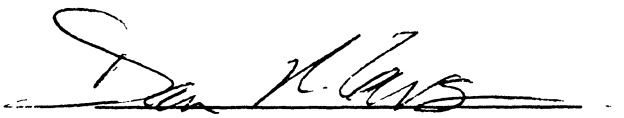
DATED this 19th day of November, 1990.

R. PAUL VAN DAM
Attorney General

DAN R. LARSEN
Assistant Attorney General

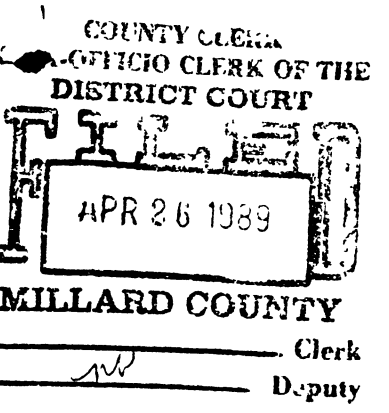
MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was mailed, postage pre-paid to Milton T. Harmon, attorney for appellant, P.O. Box 97, Nephi, UT 84648, this 19th day of November, 1990.



APPENDICES

APPENDIX A



IN THE FOURTH JUDICIAL DISTRICT COURT

OF THE STATE OF UTAH, IN AND FOR MILLARD COUNTY

****

THE STATE OF UTAH,

Plaintiff, CASE NUMBER 1090

-vs- RAY M. HARDING, JUDGE

RICHARD LEE CRAWFORD,

Defendant. MEMORANDUM DECISION

****

The Court, having considered defendant's motion for a new trial, will again deny that motion. The Court will also deny defendant's special motion for discovery.

Defendant has made a number of claims of error in his motion for a new trial, which the Court considered in it's earlier motion denying a new trial. At the present time, the only claim of error which appears to have merit is that the State withheld evidence concerning the testimony of Steve Johnson. Defendant claims that the State did not disclose information concerning the date Steve Johnson might have obtained a bedspread from the defendant and which could have been exculpatory. After consideration of the memoranda and affidavits which have been submitted, the Court finds that the defendant received all of the information which they were entitled to concerning the possible testimony of Mr. Johnson. Mr. Johnson was present and testified at the preliminary hearing. The defendant had ample opportunity to call Mr. Johnson and examine him concerning the bedspread.

Defendant also claims that Mr. Johnson was sent home from the trial by the State and could not testify. The Court finds that the State can call and use whatever witnesses it feels

are necessary, and is under no obligation to call witnesses for the defense. Had the defendant wanted Mr. Johnson's testimony, he could have issued a subpoena.

Defendant alleges that Margarite Burge might have been impaired by drugs or alcohol and was therefor an unreliable witness. The Court is not aware of any evidence that Ms. Burge was impaired at the time she testified. The only evidence is that she had alcohol on her breath after the trial. During trial the Court did not detect any evidence that she was impaired in any way. The testimony presented by Ms. Burge at trial was more helpful to the defendant than damaging.

After careful consideration of all of the claim of error made by the defendant, the Court finds that the defendant has not shown that there was error, and that the error might have made a difference in the outcome of the trial. State v. Eaton, 569 P.2d 1114 (1977). The Court finds that the critical piece of evidence in this case was the fingerprint placing the defendant at the scene of the crime and in contact with the stolen property.

Regarding the discovery issues, the Court finds that the State disclosed all information which it was required to disclose. The special motion for discovery is therefore denied.

Dated this 24th day of April, 1989.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: LeRay Jackson, Esq.
Milton T. Harmon. Esq.
Dexter L. Anderson, Esq.

APPENDIX B

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. RICHARD LEE CRAWFORD Defendant.	: : : : : :	ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND SPECIAL DISCOVERY Case No. 88-1219 District # ~~1089~~ 1090

The Court having entered its Memorandum Decision herein dated April 24, 1989; and having thereafter considered Defendant's Counsels' letter concerning an error in the prosecution's memorandum reciting that Steve Johnson testified personally at the Preliminary Hearing, when in fact he did not, the Court hereby finds as follows:

1. Defendant's Counsel and Defendant were made aware of the witness, Steve Johnson, and the bedspread in possession of the Millard County Sheriff's Office retreived from Steve Johnson, through the testimony of Officer John Kimball, who did testify at the Preliminary Hearing. (See Defendant's Memorandum in Response to Plaintiff's Memorandum Opposing A New Trial dated March 31, 1989.)

2. The Court further finds that even though Mr. Johnson was not present at the Preliminary Hearing, the Defendant received all the information which he was entitled to concerning the possible testimony of Mr. Johnson and the second

bedspread. The Defendant had ample opportunity to call Mr. Johnson and examine him concerning the bedspread, had the Defendant wanted to issue a subpoena.

3. After careful consideration of all of the claims of error made by the Defendant, the Court finds that the Defendant has not shown that there was error, and that the error might have made a difference in the outcome of the trial.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for a New Trial is overruled and denied.

IT IS FURTHER ORDERED, consistant with this Court's Memorandum Decision, dated April 24, 2989, that Defendant's Special Motion for Discovery is also overruled and denied.

DATED this 25 day of Aug, 1989.

JUDGE RAYMOND M. HARDING

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Defendant's Motion for New Trial and Special Discovery to Attorneys for Defendant: August 24, 1989

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